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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:

) Hearing Examiner File:

) **MUP-12-016(W)**

)

BRUCE STRUTHERS

)

) MOTION TO DISMISS

from a SEPA decision issued by the Director,

)

Department of Planning and Development

)

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I. INTRODUCTION

The decision under appeal in this case is a decision by the Department of Planning and Development (DPD) imposing substantive SEPA conditions on certain work that Seattle Public Utilities (SPU) seeks to undertake related to Meadowbrook Pond, a constructed stormwater management facility in North Seattle. The Examiner must dismiss Appellant's request for the imposition of additional SEPA conditions, because the City lacks substantive SEPA authority to impose the conditions requested by Appellant.

Appellant's other claims are either untimely or beyond the Examiner's jurisdiction. For example, Appellant contends that an Environmental Impact Statement (EIS) should have been required, but Appellant's claim is barred by his failure to timely appeal the Determination of Non-Significance (DNS) issued by SPU. In addition, Appellant's claims related to compliance

1 with the City's Environmentally Critical Areas (ECA) regulations are barred because Appellant
2 failed to follow the only process (e.g., the land use interpretation process under SMC ch. 23.88)
3 that could bring those claims within the Examiner's jurisdiction. Appellant's claim that a
4 shoreline substantial development permit was required is also beyond the Examiner's
5 jurisdiction, as are Appellant's claims under SMC ch. 25.11 and ch. 25.06. Thus, the Examiner
6 must dismiss the entire appeal as a matter of law.

7 **II. STATEMENT OF FACTS**

8 The decision under appeal is a DPD decision imposing conditions pursuant to substantive
9 SEPA authority.¹ The Decision concerns certain work that SPU seeks to undertake related to
10 Meadowbrook Pond, a constructed stormwater management facility in North Seattle.

11 **A. Functioning of Meadowbrook Pond facility.**

12 To understand how the Meadowbrook Pond facility works, it is useful to refer to the
13 diagram attached hereto as Exhibit A.² Meadowbrook Pond is located on Thornton Creek.
14 Upstream of the Pond, along the side of the Creek, there is an inlet to a "high flow bypass
15 pipeline" that runs eastward under the Pond.³ During periods of high flow, some water from the
16 Creek enters the high flow bypass pipeline at this inlet.⁴ This inlet is equipped with a trash
17 rack.⁵

18 Water in the Creek that does not enter the high flow bypass pipeline continues
19 downstream, through a trash rack in the Creek, and into the "forebay."⁶ When it rains, some of
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21 ¹ See City of Seattle Analysis and Substantive Conditioning of the Director of the Department of Planning and
Development, June 14, 2012 ("Decision"), Declaration of Lucas DeHerrera (DeHerrera Decl.), Ex. A.

22 ² This diagram is attachment B to the SEPA Environmental Checklist for the Project. See Declaration of Greg
Stevens ("Stevens Decl."), Ex. A.

23 ³ See SEPA Environmental Checklist, Stevens Decl., Ex. A, p. 4.

⁴ *Id.*

⁵ *Id.*, Att. B.

⁶ *Id.*, p. 4.

1 the water in the Creek enters the Pond through the "entrance dike."⁷ The Pond detains
2 stormwater in order to reduce downstream flooding, streambed scouring, and deposition of
3 sediments in Lake Washington (by allowing sediments to settle in the Pond, thus creating a need
4 for periodic dredging of the Pond).⁸

5 During periods of high flow, some water from the Pond enters the high flow bypass
6 pipeline through an "overflow pipe" at the east side of the Pond.⁹ (Water also leaves the Pond
7 and returns to Thornton Creek through an outlet weir at the southeast corner of the Pond.¹⁰) The
8 high flow bypass pipeline (carrying water both from the inlet along the Creek and from the
9 overflow pipe at the east side of the Pond) proceeds eastward towards Lake Washington.¹¹
10 Ultimately, flows from the high flow bypass pipeline are discharged through two pipes into
11 Lake Washington.¹²

12 **B. Elements of the Project.**

13 The proposed work that was the subject of the SEPA review and the DPD decision in
14 this case is as follows:

- 15 • Dredge the Pond forebay to its original sediment storage design specifications;
- 16 • Construct two new service roads to the forebay to improve service vehicle access;
- 17 • Modify the existing forebay trash rack to improve employee safety by demolishing the existing stairway and concrete platform, installing a new service walkway, and installing a new concrete pedestal to create access to the new walkway;
- 18 • Dredge all three cells of the Pond to their original sediment storage design specifications;
- 19
- 20

21 _____
⁷ *Id.*

22 ⁸ *Id.*

23 ⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

- Expand the Pond volume by approximately 10 percent by excavating approximately 10,600 cubic yards from the northwest corner of the Facility, constructing a service road into this new lobe, and constructing a flood control berm (north berm) along the north perimeter of the Pond. The existing entrance kiosk and the dogwood trees comprising Annie's Memorial tree grove would be relocated to other locations on the project parcel;
- Install permanent sediment depth gages in all Pond cells;
- Improve habitat conditions in the Pond by planting native vegetation around the perimeters of the Pond and islands;
- Improve habitat conditions in the Pond by installing five floating habitat islands;
- Add a second trash rack at the inlet to the high flow bypass pipe, a new concrete slab and two walls to accommodate the new trash rack, a new service walkway, and a new service ladder;
- Modify pedestrian and service vehicle access to the existing bypass trash rack and inlet structure to improve worker safety by widening existing asphalt pathways to 15 feet wide and adding safety features such as railings at the bypass trash rack and inlet structure.¹³

Collectively, the foregoing work represents the Meadowbrook Pond Detention Facility Dredging and Improvements Project (hereafter, the "Project"). The Pond expansion is intended to increase the Pond's sediment-trapping capacity and efficiency, and to alleviate occasional flooding that occurs in the surrounding neighborhood and downstream areas.¹⁴

C. SEPA and other review of the Project.

On March 8, 2012, SPU issued a DNS for the Project.¹⁵ Appellant attempted to appeal the DNS, but the Hearing Examiner rejected his appeal for failure to timely pay the filing fee.¹⁶ On April 2, 2012, SPU granted an Exemption from City of Seattle Environmentally Critical Areas Provisions for the Project.¹⁷ The Appellant has never requested an interpretation from the

¹³ See Decision, p. 2, DeHerrera Decl., Ex. A.

¹⁴ See SEPA Environmental Checklist, Stevens Decl., Ex. A, p. 4.

¹⁵ See DNS for the Meadowbrook Pond Detention Facility Dredging and Improvements Project, March 8, 2012, Stevens Decl., Ex. B. The DNS contains the same description of the project elements as does the Decision.

¹⁶ See Letter from Sue Tanner to Bruce Struthers, April 3, 2012, Stevens Decl., Ex. C.

¹⁷ See Exemption from City of Seattle Environmentally Critical Areas Provisions (SMC Chapter 25.09), April 2, 2012, Stevens Decl., Ex. D.

1 Director of DPD regarding the correctness of SPU's ECA exemption.¹⁸ On June 14, 2012, DPD
2 issued the Decision.¹⁹ The Decision imposes various SEPA conditions addressing notice to
3 neighboring properties and construction-related matters such as watering of the site and truck
4 loads, washing of trucks, and permissible hours for construction work.²⁰

5 **D. Appeal of DPD's Decision.**

6 Appellant filed an appeal to the Examiner, submitting a one-page appeal letter as well as
7 a longer, seven-page "Appeal Form."²¹ On July 10, 2012, in response to a motion by the
8 parties, the Examiner issued an Order on Motion to Bifurcate and Affirm in Part, bifurcating the
9 Decision into two decisions, one on the "Dredging Work" and one on the "Other Work."²² The
10 Examiner affirmed DPD's decision on the "Dredging Work," allowing that work to go
11 forward.²³

12 **III. RELIEF REQUESTED**

13 Respondents request that the Examiner dismiss this appeal as a matter of law.

14 **IV. EVIDENCE RELIED UPON**

15 This motion is based on the pleadings filed in this case and on the Declarations of Greg
16 Stevens, Lucas DeHerrera, Andrew Lee, and Mike Hrachovec, submitted herewith.

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¹⁸ See DeHerrera Decl., ¶ 3.

22 ¹⁹ See Decision, DeHerrera Decl., Ex. A.

²⁰ *Id.*, p. 5.

23 ²¹ See Appeal Letter and Appeal Form, on file with Examiner.

²² See Order on Motion to Bifurcate and Affirm in Part, July 10, 2012.

²³ *Id.*

1 **V. ARGUMENT**

2 **A. The Examiner must dismiss Appellant's claim that an EIS should have been**
3 **prepared, because Appellant failed to timely appeal the DNS.**

4 A DNS is "the written decision by the responsible official of the lead agency that a
5 proposal is not likely to have a significant adverse environmental impact, and therefore an EIS
6 is not required."²⁴ In this case, SPU issued a DNS for the Project on March 8, 2012.²⁵ The
7 deadline for appealing the DNS to the Hearing Examiner was March 29, 2012.²⁶

8 The Appellant in this case attempted to appeal the DNS, but the Hearing Examiner rejected
9 his appeal for failure to timely pay the filing fee.²⁷ Appellant now contends in this appeal that an
10 EIS should have been prepared.²⁸ However, any claim by Appellant that an EIS should have
11 been prepared for the Project needed to be raised in a timely appeal of the DNS. Since it is now
12 too late for Appellant to challenge the DNS, the Examiner must dismiss Appellant's claim that
13 an EIS should have been prepared for the Project.

14 **B. The Examiner must dismiss Appellant's substantive SEPA challenge**
15 **because there is no substantive SEPA authority for imposition of the**
16 **conditions requested by Appellant.**

17 Apart from asking the Examiner to require preparation of an EIS (and asking the
18 Examiner to allow the Dredging Work to go forward), Appellant's Appeal Form seeks five
19 elements of relief, plus "additional conditions to mitigate the impacts of the actions associated
20 with the 'improvements'."²⁹ At the prehearing conference, Appellant described the content of

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²⁴ SMC 25.05.734.

22 ²⁵ See DNS, Stevens Decl., Ex. B.

23 ²⁶ *Id.*

²⁷ See Letter from Sue Tanner to Bruce Struthers, Stevens Decl., Ex. C.

²⁸ See Appeal Letter and Appeal Form.

²⁹ See Appeal Form, pp. 6-7.

1 those "additional conditions."³⁰ Combining the five elements of relief from the Appeal Form
2 and the additional conditions stated at the prehearing conference results in the following list:

- 3 1. Block the inlet from the creek to the high flow bypass and
4 remove the segment of the high flow bypass pipeline under the
5 pond (also described as "daylighting" this pipe), so that
6 stormwater only enters the high flow bypass at the overflow
7 manhole at the east side of pond
- 8 2. Remove existing concrete foundation of the abandoned Lake
9 City Sewage Treatment Plant from the northeast cell of the
10 pond
- 11 3. Do not remove any trees from the site or disturb any plants
- 12 4. Do not modify the inlet to the high flow bypass, as that will
13 cause changes in hydraulic performance
- 14 5. Do not provide 15' maintenance road from 36th Avenue NE to
15 the western inlet to the high flow bypass
- 16 6. Do not modify the forebay trash rack or provide maintenance
17 roads to the forebay
- 18 7. Impose monitoring requirements that would apply to a
19 Combined Sewer Overflow under the citywide CSO Long
20 Term Control Plan
- 21 8. Require enhanced instrumentation and monitoring of the
22 operation of the pond, including flow rate monitors and
23 temperature gauges at all inlets and outlets
- 24 9. Implementation of the Project should be consistent with the
25 proposed "Confluence Project"

26 As discussed below, the Examiner must dismiss Appellant's requests for these conditions
27 because there is no substantive SEPA authority to support imposition of these conditions.

28 ³⁰ Among those "conditions" was one that Appellant described as expanding the perimeter of the project. As the
29 Examiner noted at the prehearing conference, expanding the perimeter of the project is not a condition. Rather,
30 Appellant appears to be referring to the question of whether a shoreline substantial development permit was
31 required, an issue that is discussed in section V.D below.

1 **1. The Examiner must dismiss Appellant's requests for conditions 1 and**
2 **2 because those "conditions" address preexisting conditions, not any**
3 **work proposed as part of the Project.**

4 SMC 25.05.665.A.2 provides that, based on the City's SEPA policies, "a
5 decisionmaker may condition a proposal to reduce or eliminate *its environmental impacts*. . ."
6 (Emphasis added.) As evidenced by the plain language of the regulation, SEPA substantive
7 authority may be exercised to reduce or eliminate environmental impacts *resulting from the*
8 *proposal*.

9 As such, substantive SEPA authority may not be used to mitigate environmental
10 impacts resulting from existing conditions. This reflects the core principle, recognized by the
11 Examiner and reflected in numerous cases, that under SEPA "environmental impact analysis in
12 relation to existing conditions is the norm." *See, e.g., In the Matter of the Appeal of Fremont*
13 *Neighborhood Council, et al.*, Hearing Examiner File W-08-005, October 30, 2008, Conclusion
14 No. 9.

15 Appellant's requested conditions 1 and 2 ask that the high flow bypass pipeline under
16 the Pond be "daylighted" and that the concrete foundation of the abandoned Lake City Sewage
17 Treatment Plant located in the northeast cell of the Pond be removed. However, it is undisputed
18 that these installations were constructed many years ago and therefore are existing conditions;
19 they are not proposed as part of the Project. Thus, even if these installations caused
20 environmental impacts, the Examiner lacks authority to impose any condition to address those
21 impacts. Thus, the Examiner lacks authority to impose Appellant's requested conditions 1 and

22 2.³¹

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³¹ Appellant's "daylighting" request may also relate, in Appellant's view, to SMC ch. 25.09. *See* Appeal Form, p. 6.
Issues related to Appellant's claims related to SMC ch. 25.09 are addressed in section V.C below.

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1	Modify the existing forebay trash rack	Appellant's condition 6 specifically prohibits
2		this work
3	Construct two new service roads to the forebay	Appellant's condition 6 specifically prohibits
4		this work
5	Install permanent sediment depth gages in all	Appellant would allow this work
6	pond cells	
7	Improve habitat conditions by installing five	Appellant would allow this work
8	floating habitat islands	
9	Improve habitat conditions by planting native	Appellant would allow this work
10	vegetation around perimeter of pond/islands	

11
12 Simply put, Appellant does not want to condition the Project; rather, Appellant seeks
13 denial of every element of the Project that would allow it to serve its purpose (leaving only
14 mitigation-type elements that Appellant desires). SEPA could only authorize denial of the
15 Project if an EIS had been prepared, but Appellant lost his opportunity to obtain an EIS when he
16 failed to timely appeal the DNS. Thus, the Examiner lacks authority to impose Appellant's
17 requested conditions 3 through 6.

18 **3. In addition to the reason set forth in the preceding section, the**
19 **Examiner must also dismiss Appellant's request for condition 4**
20 **because an action may be conditioned under substantive SEPA**
21 **authority only to mitigate adverse impacts identified in the**
22 **environmental documents.**

23 SMC 25.05.660.A.2 provides the following limitation on the City's authority to impose
conditions under its substantive SEPA authority: "Mitigation measures shall be related to

1 *specific, adverse environmental impacts clearly identified in an environmental document* on the
2 proposal. . .” (Emphasis added.)³⁴

3 Appellant’s requested condition 4 asks that SPU not modify the inlet to the high flow
4 bypass, because Appellant alleges that the proposed work will cause changes in hydraulic
5 performance. The proposed work at the inlet to the high flow bypass consists of adding a second
6 trash rack at the inlet, a new concrete slab and two walls to accommodate the new trash rack, a
7 new service walkway, and a new service ladder.³⁵

8 However, Appellant cannot point to any SEPA environmental document for the Project
9 that identifies a specific, adverse environmental impact resulting from the proposed work at the
10 inlet to the high flow bypass. The reason for this is simple: the proposed work will not change
11 the flow characteristics of the existing inlet to the bypass. Far from identifying any adverse
12 environmental impact resulting from the proposed work, the SEPA checklist points out that
13 “[t]he project would not alter any flow control features affecting Thornton Creek or the Pond,
14 including the high flow bypass pipe inlet. . .”³⁶ The checklist further states that “[n]o surface,
15 ground, or runoff water impacts are anticipated” from the Project.³⁷

16 If this case goes to hearing, Respondents’ witnesses will fully explain why Appellant’s
17 characterization of the effect of the work at the inlet to the high flow bypass is flawed.
18 Fundamentally, however, Appellant has no right to bring that matter before the Examiner at this
19 point. The SEPA regulations provide for a narrowing of the scope of permissible SEPA issues as
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22 ³⁴ Under SMC 25.05.744, “Environmental document” means “any written public document prepared under this
chapter.”

23 ³⁵ See Decision, p. 2, DeHerrera Decl., Ex. A.

³⁶ See SEPA checklist, p. 3, Stevens Decl., Ex. A.

³⁷ *Id.*, p. 12.

1 a project moves through the SEPA process. First, environmental documents (like the SEPA
2 checklist or, if a DNS is not warranted, an Environmental Impact Statement) are prepared so that
3 impacts can be identified and discussed. Then, substantive SEPA authority may be exercised to
4 address impacts disclosed in the environmental documents. The substantive SEPA conditioning
5 stage is *not* an opportunity for the existence of impacts to be revisited.³⁸ Thus, the Examiner
6 lacks authority to impose Appellant's requested condition 4.

7 **4. In addition to the reasons set forth in the preceding sections, the**
8 **Examiner must also dismiss Appellant's request for conditions 3**
9 **through 6 because the City's SEPA policies do not authorize those**
10 **conditions.**

11 Under SMC 25.05.660.A.1, SEPA mitigation measures "shall be based on policies,
12 plans, rules, or regulations formally designated in Sections 25.05.665, 25.05.670 and 25.05.675
13 as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is
14 issued." *See also* SMC 25.05.665.A.2 ("The policies set forth in this part of the SEPA Rules
15 shall serve as the basis for exercising substantive SEPA authority pursuant to SMC Section
16 25.05.660. Based on these policies, a decisionmaker may condition a proposal to reduce or
17 eliminate its environmental impacts. . .").

18 **a. The City's SEPA policy regarding plants and animals does not**
19 **authorize Appellant's requested condition 3.**

20 As noted above, Appellant's condition 3 precludes any tree removal or disturbance of
21 vegetation. However, the City's SEPA policy regarding plants and animals authorizes SEPA
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23 ³⁸ Once again, Appellant's options at this stage are limited by his failure to timely appeal the DNS. If Appellant
believed the analysis in the checklist was wrong and that significant impacts would result from the proposal
necessitating an EIS, he needed to timely appeal the DNS, but he did not do so.

1 conditions to prevent loss of vegetation only under certain limited circumstances.³⁹ Appellant
2 does not, and cannot, show that this policy authorizes Appellant's requested condition 3.

3 **b. The City's SEPA policy regarding drainage does not authorize**
4 **Appellant's requested condition 4.**

5 It appears that Appellant's requested condition 4 is intended to address drainage
6 impacts that Appellant believes will result from the Project. The City's SEPA policy regarding
7 drainage impacts evidences an intent to address the impacts of projects that *create* stormwater
8 runoff. The policy background of SMC 25.05.675.C states that "[p]roperty development and
9 redevelopment often create increased volumes and rates of stormwater runoff."⁴⁰ By contrast,
10 the proposed Project would not create a need to manage additional stormwater runoff beyond
11 existing conditions and is actually designed to increase stormwater detention capacity in the
12 Thornton Creek watershed.⁴¹

13 Moreover, the policies in SMC 25.05.675.C suggest an intent to address projects other
14 than downstream drainage facilities.⁴² Finally, the policies state that "[t]o mitigate adverse
15 drainage impacts. . . projects may be required to provide drainage control measures designed to a
16 higher standard than the design storm specified in the Stormwater Code. . . and the
17 Environmentally Critical Areas Ordinance. . ."⁴³ The concept of providing drainage control
18 measures logically applies to controlling stormwater before it leaves a site that generates runoff –
19 not to the design of a public storm drainage facility that receives such stormwater.

21 ³⁹ SMC 25.05.675.N.

22 ⁴⁰ SMC 25.05.675.C.1.a.

23 ⁴¹ See SEPA Environmental Checklist, p. 11, Stevens Decl., Ex. A.

⁴² See SMC 25.05.675.C.2.b.2 (stating that one of the types of projects that may be conditioned, regardless of whether the threshold criteria in the Overview Policy are met, is "[p]rojects located in areas where downstream drainage facilities are inadequate").

⁴³ SMC 25.06.675.C.2.c.

1 In sum, a fair reading of the City's SEPA policy regarding drainage is inconsistent with
2 the use of that policy to impose "mitigation" for drainage impacts in the form of micro-
3 management of the design of a public storm drainage facility like the Meadowbrook Pond
4 facility.⁴⁴

5 **5. The Examiner must dismiss Appellant's request for condition 7**
6 **because neither the Pond nor the high flow bypass pipeline is a**
7 **Combined Sewer Overflow.**

8 Appellant's requested condition 7 asks the Examiner to impose on the Project "the same
9 monitoring and instrumentation that is being instituted for the citywide CSO Long Term Control
10 Plan."⁴⁵ However, the Examiner must reject this request, because it is based on a fundamental
11 misunderstanding of the nature of the Meadowbrook Pond facility.

12 Meadowbrook Pond and the high flow bypass pipeline that carries stormwater to Lake
13 Washington simply do not constitute a Combined Sewer Overflow, or CSO. A CSO arises in a
14 specific context: where there is a "combined sewer system" where the sewer pipes are designed
15 to carry both sanitary sewage and stormwater, and the capacity of the pipe is exceeded such that
16 excess flows are released into water bodies such as Lake Washington.⁴⁶ These releases are
17 called combined sewer overflows (CSOs), and the location of the relief points (or CSO outfalls)
18 have been identified and mapped.⁴⁷

19 The high flow bypass pipeline associated with Meadowbrook Pond is not designed to
20 carry both sanitary sewage and stormwater (only stormwater) and thus is not a "combined
21

22 ⁴⁴ It is not clear what impacts Appellant believes are addressed by his requested conditions 5 and 6, but Respondents
23 can see no SEPA policy basis for those conditions either.

⁴⁵ See Appeal Form, p. 4.

⁴⁶ See Declaration of Andrew Lee (Lee Decl.), ¶ 3

⁴⁷ *Id.*

1 sewer.”⁴⁸ As such, the pipes that discharge water into Lake Washington from Meadowbrook
2 Pond and the high flow bypass pipeline do not constitute a CSO outfall.⁴⁹

3 Appellant is correct that there is a King County sewer line under Meadowbrook Pond.
4 However, even if sewage were somehow released from that line and made its way into the Pond,
5 that does not make the Pond, or the high flow bypass pipeline, a CSO.⁵⁰ In sum, there is no basis
6 to impose upon the Project any requirements, related to monitoring or otherwise, that would
7 apply to a CSO, and the Examiner must therefore dismiss Appellant’s request for condition 7.⁵¹

8 **6. The Examiner must dismiss Appellant’s request for condition 8**
9 **because that condition would serve no purpose.**

10 Appellant’s requested condition 8 would require enhanced instrumentation and
11 monitoring of the operation of the Pond, including flow rate monitors and temperature gauges at
12 all inlets and outlets. It is unclear what alleged impact Appellant believes this condition would
13 address. However, even assuming condition 8 was intended to address an impact disclosed in an
14 environmental document and was authorized under the City’s SEPA policies, the Examiner lacks
15 SEPA authority to impose condition 8 because it does not comply with the requirement that
16 SEPA mitigation measures shall be “reasonable and capable of being accomplished.”⁵²

17 Once again, Appellant fundamentally misunderstands the nature of the Meadowbrook
18 Pond facility. Flow rate monitors and temperature gauges with real-time monitoring output are
19 typically used for facilities that are operated in a mode of continuous monitoring and adjustment

21 ⁴⁸ *Id.*, ¶ 5.

22 ⁴⁹ *Id.*

23 ⁵⁰ *Id.*, ¶ 6.

⁵¹ Moreover, the CSO Long Term Control Plan will not be finalized and adopted until 2015. *Id.*, ¶ 4. Thus, it is unclear what the “monitoring and instrumentation that is being instituted for the citywide CSO Long Term Control Plan” would be even if the Examiner wished to impose it in this case.

⁵² SMC 25.05.660.A.3.

1 such as wastewater treatment facilities.⁵³ These facilities typically have corresponding controls
2 to remotely alter elevations or operation of key hydraulic elements such as weirs, gates and
3 valves and thus alter the flow rates through the various parts of the facility.⁵⁴

4 By contrast, the Meadowbrook Pond facility has only fixed hydraulic control elements,
5 none of which have any adjustability to control flow rate, either through remote or on-site
6 adjustments.⁵⁵ There are no elements in the pond which can be mechanically adjusted to
7 accommodate any issues related to temperature or flow through the pond.⁵⁶ Thus, imposing
8 Appellant's requested condition 8 would serve no practical purpose from the standpoint of
9 continuously monitoring and altering the daily operation of the pond.⁵⁷

10 **7. The Examiner must dismiss Appellant's request for condition 9**
11 **because SEPA does not authorize denial of Project elements to**
12 **eliminate alleged conflicts with a future, separate project.**

13 Appellant's requested condition 9 asks that implementation of the Project be required to
14 be consistent with the proposed "Confluence Project" (another SPU project that is proposed to be
15 developed following the Project). The Confluence Project calls for replacing the culvert for the
16 south branch of Thornton Creek under 35th Avenue NE and reconstructing the north and south
17 branches of Thornton Creek along with its associated floodplain area (including planting riparian
18 and floodplain areas with native trees and shrubs).⁵⁸ SEPA review has not yet been undertaken
19 for the Confluence Project.⁵⁹

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21 ⁵³ See Declaration of Mike Hrachovec, ¶ 3.

22 ⁵⁴ *Id.*

23 ⁵⁵ *Id.*, ¶ 4. The only adjustable element is the bypass pipe inlet grate, which was designed to be lifted up to allow
debris to pass down the bypass pipe – and this functionality is not used. *Id.*

⁵⁶ *Id.*, ¶¶ 5-6.

⁵⁷ *Id.*, ¶ 7.

⁵⁸ See Stevens Decl., ¶ 6.

⁵⁹ *Id.*, ¶ 7.

1 In his Appeal Form, Appellant suggests that the Project would be inconsistent with the
2 "follow-on Confluence Project" because the Confluence Project "is designed to allow flooding
3 into the northern boundary of the expanded Meadowbrook Pond, over the proposed newly-
4 constructed maintenance road."⁶⁰ In effect, Appellant wants certain elements of the Project to be
5 denied because of their alleged inconsistency with the proposed, later Confluence Project.

6 For several reasons, Appellant's request goes beyond the City's substantive SEPA
7 authority. First, as fully discussed above, SEPA could only authorize denial of the Project if an
8 EIS had been prepared, but Appellant lost his opportunity to obtain an EIS when he failed to
9 timely appeal the DNS.

10 Second, the Confluence Project is not part of the proposal whose SEPA review is at issue
11 in this appeal. The proposal for which the DNS was issued, and for which DPD made its
12 substantive SEPA conditioning decision, is the Meadowbrook Pond Detention Facility Dredging
13 and Improvements Project (as described in the DNS and the Decision, and referred to herein as the
14 "Project").⁶¹ The Project is not dependent on the Confluence Project for its completion or
15 successful operation; the Project can and would proceed whether or not the Confluence Project is
16 ever constructed.⁶²

17 Thus, from a SEPA standpoint, the Confluence Project is completely irrelevant to whether
18 the Project may proceed. If the Project somehow created a condition that was inconsistent with the
19 Confluence Project as currently proposed (a highly unlikely situation given that SPU is the
20 proponent for both projects), SPU would simply need to take that into account in designing the later
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22 ⁶⁰ See Appeal Form, p. 5.

⁶¹ See DNS, Stevens Decl., Ex. B; Decision, DeHerrera Decl., Ex. A.

23 ⁶² See Stevens Decl., ¶ 8. As noted above, Appellant failed to timely appeal the DNS. If Appellant had any disagreement with SPU's framing of the proposal that was the subject of the SEPA review in this case, this appeal is not a forum in which he is entitled to raise it.

1 proposal, which will be subject to its own SEPA review. Thus, the Examiner must dismiss
2 Appellant's request for condition 9.

3 In sum, as a matter of law, the Examiner must dismiss Appellant's requests for
4 imposition of additional SEPA conditions because the City lacks SEPA authority to impose the
5 conditions requested by Appellant.

6 **C. The Examiner must dismiss all issues related to compliance with SMC ch.**
7 **25.09 because Appellant has never requested an interpretation under SMC**
8 **ch. 23.88 regarding the ECA exemption that SPU granted in this case.**

9 In his "Appeal Form," Appellant raises issues regarding the correctness of SPU's ECA
10 exemption and the Project's alleged noncompliance with provisions of SMC ch. 25.09.⁶³
11 However, the Examiner must dismiss all issues related to SMC ch. 25.09 because Appellant has
12 never requested an interpretation under SMC ch. 23.88 regarding SPU's ECA exemption.

13 Under the City's Code, the Examiner lacks jurisdiction to directly review an ECA
14 exemption. Rather, administrative review of an ECA exemption must occur through the land
15 use interpretation process set forth in SMC ch. 23.88.020 (with an appeal to the Examiner being
16 possible only as provided through that process). SMC ch. 25.09 provides that:

17 The provisions of Section 23.88.020 apply to a decision by the
18 Director as to the meaning, application or intent of any provision
19 of this chapter. Other administrative appeal provisions set out in
20 Title 23 do not apply to decisions under this chapter, except as
21 specifically provided.⁶⁴

22
23 ⁶³ See Appeal Form, pp. 3-6.

⁶⁴ SMC 25.09.017.F.

1 The provision of SMC ch. 25.09 regarding ECA exemptions, SMC 25.09.045, does not provide
2 for an administrative appeal of an ECA exemption to the Hearing Examiner under SMC ch.
3 23.76.⁶⁵

4 As such, the Examiner may review the correctness of an ECA exemption only if the
5 issue reaches the Examiner through the land use interpretation process of SMC 23.88.020. SMC
6 ch. 23.88 provides a process by which a person may request and obtain a formal interpretation
7 by the Director of DPD “as to the meaning, application or intent of any development regulation
8 in Title 23. . . or in Chapter 25.09, Regulations for Environmentally Critical Areas, as it relates
9 to a specific property.”⁶⁶ A request for an interpretation shall be filed with the Director
10 accompanied by the required fee.⁶⁷ However, in this case, Appellant never requested a land use
11 interpretation from the Director of DPD under SMC ch. 23.88 regarding the correctness of
12 SPU’s ECA exemption, nor has the Director of DPD issued such an interpretation.⁶⁸

13 Under SMC ch. 23.88, it is possible in some cases for an appellant to include, in an
14 appeal of a Type II decision, a request to the Director of DPD for an interpretation, combined
15 with an appeal of such interpretation.⁶⁹ In such a case, the Director shall issue an interpretation
16 and file it with the Examiner at least five calendar days before the appeal hearing.⁷⁰ If a request
17 for interpretation is included in an appeal to the Hearing Examiner of a related project decision,
18 a copy shall be filed with the Director, accompanied by the applicable fee.⁷¹

20
21 ⁶⁵ By contrast, for example, in the case of environmentally critical areas *exceptions*, SMC ch. 25.09 provides that
“[t]he process and procedures for notice of decision and appeal of an environmentally critical areas exception shall
be provided in the manner prescribed for Type II land use decisions in SMC ch. 23.76.” SMC 25.09.300.F.1.

22 ⁶⁶ SMC 23.88.020.A.

⁶⁷ SMC 23.88.020.B.

⁶⁸ See DeHerrera Decl., ¶ 3.

23 ⁶⁹ SMC 23.88.020.C.3.c.

⁷⁰ *Id.*

⁷¹ SMC 23.88.020.B.

1 However, while Appellant's "Appeal Form" mentions SPU's ECA exemption and
2 questions its correctness, nowhere in Appellant's appeal letter or in the "Appeal Form" is there
3 any specific request that the Director of DPD issue an interpretation regarding the correctness of
4 SPU's ECA exemption. Similarly, even if one somehow construed the "Appeal Form" as
5 constituting a request for an interpretation (rather than as a request that the Examiner review the
6 ECA exemption), Appellant did not pay the applicable fee, as required by SMC 23.88.020.B.⁷²

7 In sum, Appellant has never requested that the Director of DPD issue an interpretation
8 regarding the correctness of SPU's ECA exemption, and thus has failed to follow the only
9 process that could bring that issue before the Examiner. Thus, the Examiner lacks jurisdiction
10 over and must dismiss any challenge by Appellant to the correctness of SPU's ECA exemption.
11 Moreover, since the propriety of the ECA exemption is beyond challenge, the Examiner must
12 also dismiss all claims by Appellant regarding the Project's compliance with SMC ch. 25.09.

13 **D. The Examiner must dismiss Appellant's claim that a shoreline substantial**
14 **development permit was required.**

15 Appellant contends that DPD erred by not requiring SPU to obtain a shoreline
16 substantial development permit.⁷³ However, Appellant's argument is legally unfounded and the
17 Examiner lacks jurisdiction over this issue in any event. The City's Shoreline Master Program
18 (SMP) applies to the Shoreline District, which is defined to include certain geographical areas
19 that meet the definition of "shorelines."⁷⁴ None of the work contemplated by the Project will
20 occur within the "shorelines" pursuant to the SMP.⁷⁵

21 ⁷² See DeHerrera Decl., ¶ 3.

22 ⁷³ See Appeal Form, pp. 2-3.

23 ⁷⁴ SMC 23.60.010.A.

⁷⁵ The SMP's definition of "shorelines" specifically excludes "[s]horelines on segments of streams upstream of a point where the mean annual flow is twenty (20) cubic feet per second or less and the wetlands associated with such upstream segments." SMC 23.60.936. The mean annual flow of Thornton Creek is well below 20 cubic feet per second. See City of Seattle State of the Waters 2007 Report, p. 154, DeHerrera Decl., Ex. B.

1 Appellant nonetheless suggests that a shoreline substantial development permit was
2 required because the Meadowbrook Pond facility allegedly includes all of the pipes by which
3 water from the Pond reaches Lake Washington (which is in the "shorelines").⁷⁶ However,
4 Appellant's characterization of the extent of the facility misses the point for purposes of
5 assessing the need for a shoreline substantial development permit. Under the SMP, a shoreline
6 substantial development permit is required when "substantial development" occurs in the
7 Shoreline District.⁷⁷ "Development" refers to activity or work.⁷⁸ Thus, where (as in this case) a
8 proposal involves no work or activity constituting "substantial development" within the
9 "shorelines," no substantial development permit can be required.⁷⁹

10 Moreover, the Examiner lacks jurisdiction over Appellant's claim that the Project
11 required a shoreline substantial development permit. The Examiner has jurisdiction to hear
12 appeals of Type II decisions as listed in SMC 23.76.006.C.⁸⁰ A determination regarding the
13 need for a shoreline substantial development permit is not one of the listed decisions. Rather,
14 DPD's determination that the Project did not require a shoreline substantial development permit
15 was a Type I decision. Type I decisions are not appealable to the Examiner unless an appeal
16 reaches the Examiner through the land use interpretation process of SMC 23.88.020.⁸¹

17
18 ⁷⁶ See Appeal Form, p. 2.

19 ⁷⁷ SMC 23.60.020.A, 23.60.022.B.

20 ⁷⁸ See SMC 23.60.908 ("Development" means "a use consisting of the construction or exterior alteration of
21 structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of
22 piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal
23 public use of the surface of the waters overlying lands subject to this title at any water level."). "Substantial
development" generally refers to development of which the total cost or fair market value exceeds \$2,500. SMC
23.60.936.

⁷⁹ The only authority cited by Appellant is the SMP's "liberal construction" provision, SMC 23.60.012. However,
that provision cannot create a requirement for a shoreline permit contrary to the express language of the SMP.
Appellant also seems to suggest that a shoreline substantial development permit was required because water from
the Pond ultimately reaches and "affects" Lake Washington. See Appeal Form, p. 2. However, no legal authority
supports such an approach, which would vastly expand the reach of the SMP.

⁸⁰ SMC 23.76.022.A.2.

⁸¹ SMC 23.76.022.A.1.

1 However, Appellant never requested or obtained an interpretation by the DPD Director
2 as to whether the Project required a shoreline substantial development permit.⁸² Moreover, even
3 if Appellant's Appeal Form could somehow be construed as requesting such an interpretation,
4 Appellant has not paid the applicable fee (per SMC 23.88.020.B) that would enable Appellant to
5 request an interpretation as part of this appeal.⁸³ Thus, the Examiner lacks jurisdiction over and
6 must dismiss Appellant's claim that a shoreline substantial development permit was required.⁸⁴

7 **E. The Examiner must dismiss Appellant's claim regarding protection of**
8 **"exceptional trees" under SMC ch. 25.11.**

9 In his statement of appeal, Appellant contends that "SPU has acknowledged the presence
10 of exceptional trees" and that "DPD erred by not requiring conditions to protect those trees as
11 specified in SMC 25.11.050.B."⁸⁵ However, the Examiner lacks jurisdiction over any claim by
12 Appellant regarding compliance with SMC ch. 25.11.

13 There is no provision in SMC ch. 25.11 allowing for an administrative appeal to the
14 Examiner of matters arising under that chapter. Still, under SMC ch. 25.11, "[e]xceptional trees
15 and potential exceptional trees shall be identified on site plans and exceptional tree status shall
16 be determined by the Director" of DPD.⁸⁶ However, even assuming that the foregoing provision
17 makes SMC 25.11 a development standard for purposes of SMC ch. 23.76, a determination
18 regarding compliance with development standards is a Type I decision.⁸⁷ As noted above, the
19

20 ⁸² See DeHerrera Decl., ¶ 4.

21 ⁸³ *Id.*

22 ⁸⁴ Similarly, Appellant errs in contending that SMC 23.76.015 required DPD to conduct "a public meeting on a
23 project proposal of broad public significance that should require a shoreline conditional use or shoreline variance."
See Appeal Form, p. 4. First, the public meeting described in SMC 23.76.015 is optional, not mandatory. Second,
neither of those approvals could be required.

⁸⁵ See Appeal Form, p. 6.

⁸⁶ SMC 25.11.050.A

⁸⁷ SMC 23.76.006.B.1.

1 Examiner lacks jurisdiction over appeals of Type I decisions unless an appeal reaches the
2 Examiner through the land use interpretation process of SMC 23.88.020.⁸⁸

3 However, Appellant never requested or obtained an interpretation by the DPD Director as
4 to whether the Project complied with SMC ch. 25.11.⁸⁹ Moreover, even if Appellant's Appeal
5 Form could somehow be construed as requesting such an interpretation, Appellant has not paid
6 the applicable fee (per SMC 23.88.020.B) that would enable Appellant to request an
7 interpretation as part of this appeal.⁹⁰ Thus, the Examiner lacks jurisdiction over and must
8 dismiss Appellant's claim regarding compliance with SMC ch. 25.11.

9 **F. The Examiner must dismiss Appellant's claim regarding SMC ch. 25.06.**

10 Finally, Appellant's Appeal Form includes a one-sentence argument that DPD erred by
11 not imposing certain requirements arising out of the City's Floodplain Development Ordinance,
12 SMC ch. 25.06.⁹¹ SMC ch. 25.06 regulates development in "areas of special flood hazard."
13 However, there is no provision in SMC ch. 25.06 providing for an administrative appeal to the
14 Examiner of matters arising under that chapter.⁹² Moreover, DPD has not yet reviewed the
15 Project's compliance with SMC ch. 25.06; DPD will review that issue in connection with the
16 pending building permit application.⁹³ Thus, the Examiner lacks jurisdiction over and must
17 dismiss Appellant's claim regarding SMC ch. 25.06.

18
19
20
21 ⁸⁸ SMC 23.76.022.A.1. By the same token, a determination regarding compliance with SMC ch. 25.11 is not listed
among the "Type II" decisions that are appealable to the Examiner. SMC 23.76.006.C.

22 ⁸⁹ See DeHerrera Decl., ¶ 5.

23 ⁹⁰ *Id.*

⁹¹ See Appeal Form, p. 5.

⁹² Nor does SMC ch. 25.06 contain any reference to the land use interpretation process of SMC ch. 23.88. Similarly,
SMC ch. 23.88 does not contain any reference to SMC ch. 25.06.

⁹³ See DeHerrera Decl., ¶ 7.

1 **VI. CONCLUSION**

2 The City lacks substantive SEPA authority to impose the conditions requested by
3 Appellant, and all of Appellant's other claims are either untimely or beyond the Examiner's
4 jurisdiction. Thus, Respondents request that the Examiner dismiss this appeal as a matter of
5 law.

6 Respectfully submitted this 15th day of August, 2012.

7 PETER S. HOLMES
8 Seattle City Attorney

9 By: s/Jeffrey S. Weber, WSBA #24496
10 Assistant City Attorney
11 *Attorneys for Respondents*
12 *Seattle Public Utilities & Department of*
13 *Planning & Development*
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23

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the following documents:

1. Respondents' Motion to Dismiss;
2. Declaration of Greg Stevens;
3. Declaration of Lucas DeHerrera;
4. Declaration of Andrew Lee; and
5. Declaration of Mike Hrachovec

with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of the same documents were sent to the following party listed below in the manner indicated:

R. Bruce Struthers
10514 Riviera Place NE
Seattle, WA 98125
Appellant

(X) U.S. First Class Mail, postage prepaid
(X) Email: bruce.struthers@comcast.net

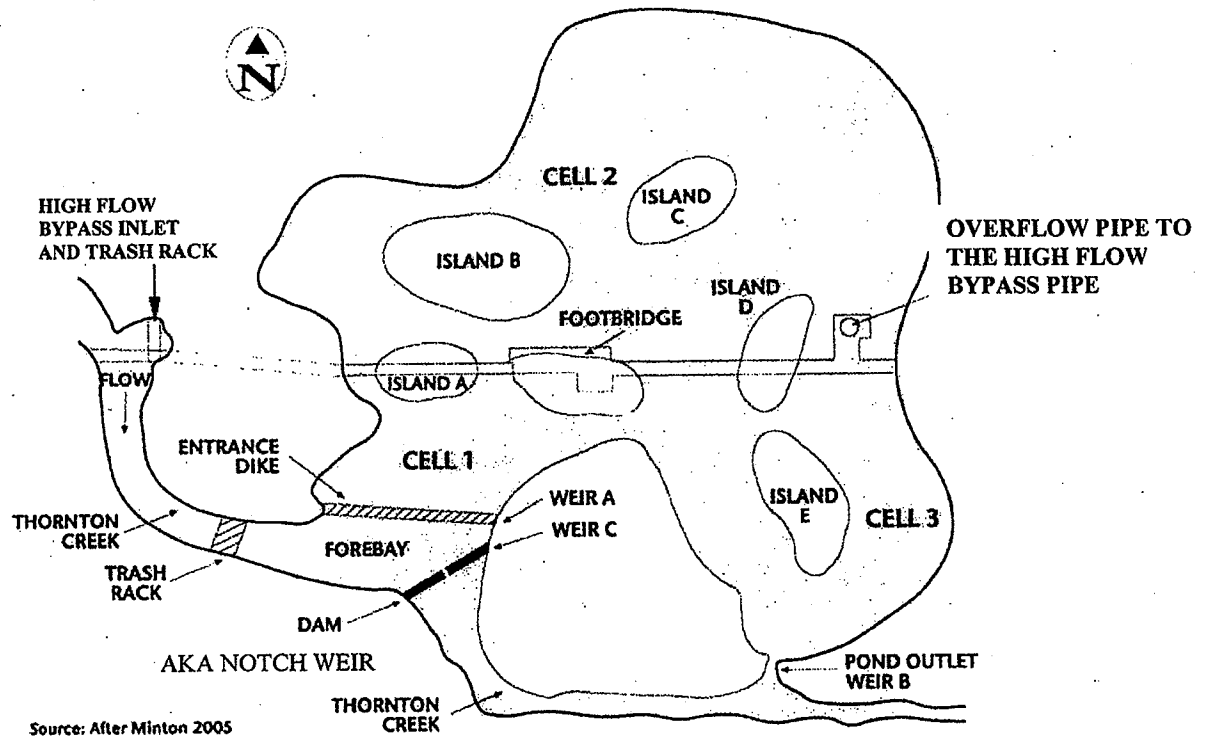
the foregoing being the last known address of the above-named party.

Dated this 15th day of August, 2012, at Seattle, Washington.


ROSIE LEE HAILEY

EXHIBIT A

Attachment B:
General Layout of Existing Meadowbrook Pond Facility



Meadowbrook Pond General Layout